DANLEY *vs.* RECTOR.

In trover the plaintiff must prove (1) property in himself, and a right to the possession at the time of the conversion by the defendant; (2) a conversion by the defendant, and (3) the value of the property.

Although the father is entitled to the services of the minor son, yet if the latter performs them under a promise from the father that he shall have a negro boy, who is accordingly passed over to the son, by an express declaration on the part of the father that such boy belongs to the son and was given in consideration of the services, the agreement is consumated, and may be treated as a sale, in which the right of possession passes, and the title become perfect in the son without formal delivery.

Possession must accompany a verbal gift to render it valid, and transfer the title.

Where an infant child resides with his father at the time a gift of a slave is made, and continues a member of his family, the possession will be presumed to be in the infant, the rightful owner, although the father exercises control over the slave and appropriates his labor.

The doctrine in *Dodd vs. McCraw,* 3 *Eng.* 84, cited and approved.

Title once acquired either by sale or gift is not divested by the mere fact that the purchaser or donee did not thereafter take the property into his exclusive possession and appropriate it to his exclusive use.

Suffering property to remain in the possession and control of the vendor after sale may, in some instances, as regards subsequent creditors of the vendor who contract on the faith of the property thus abandoned to his use and apparent ownership, be evidence of fraud.

And so if the vendor or donor, at the time of the gift or sale, be in failing circumstances, prior creditors may well urge such circumstances in connection with others as evidence of fraud.

Evidence as to subsequent possession and acts of ownership on the part of the

vendor or donor is admissible, but such evidence must be restricted to the point as to whether in fact a sale or gift did take place, and in either case subsequent possession and use by the donor or vendor cannot defeat a title once acquired.

A judgment rendered upon a delivery bond upon motion and without notice to obligors, is void, and a sale under an execution issued thereon confers no title on the purchaser, and the judgment and execution are not admissible as evidence.

The case of *McKnight vs. Smith*, 5 *Ark. R.* 409, cited and approved.

If the owner of property, with a full knowledge of the facts, stands by and permits it to be sold to an innocent purchaser without making his title known, such owner is *equitably* estopped from setting up his title against such innocent purchaser, but the latter must avail himself of this estoppel in a court of equity, and cannot do so at law.

The mere presence of a third person at a sheriff's sale, who has title to the property sold upon a void judgment, does not estop him from asserting his title *at law* to the property thus sold.

The rule *caveat emptor* applies to sales by sheriffs, executors, administrators, and other trustees.

Writ of Error to Pulaski Circuit Court.

This was an action of trover and conversion, brought by Christopher C. Danley against Henry M. Rector, to recover the value of a negro slave named Henry, and was determined before the Hon. WILLIAM H. FEILD, in the Pulaski Circuit Court, in December, 1846.

The declaration averred, in substance, that, on the 29th May, 1843, the plaintiff was possessed, as of his own property, of a negro slave for life named Henry, of dark copper color, 17 years of age, and that he came to the possession of the defendant who refused to deliver him to the plaintiff, and converted him to his own use. The defendant plead not guilty, on which issue was taken, and the cause was tried by jury, and a verdict and judgment was given for the defendant.

On the trial the plaintiff introduced the following evidence:

David P. Logan—Had known Col. James Danley from 1836 to his death; had offered him, in 1843, the sum of $500 for a negro boy of dark copper color, named Henry, about 14 years old, then on the farm of Col. D., in Pulaski county, and in his possession and under his control: but he refused to sell, saying

the negro belonged to one of his children, and the witness was under the impression that Col. D. was the owner until otherwise informed.

Benjamin F. Danley.—In 1836, Col. D., my father bought from Capt. R. D. C. Collins, and gave the negro boy mentioned in the declaration to the plaintiff, my brother, and, as I understood, in consideration of services performed by the plaintiff in carrying the United States mail from Little Rock to Crawford court-house, Arkansas, for which route Col. D. was contractor. The evening Henry was brought home my father called up a man named Galbreath, who died in 1837, but was then living with my father, or called up the plaintiff—do not recollect which—and, in my presence, and that of other members of the family, said he gave Henry to the plaintiff. If my father did not then, I have heard him say at other times, it was for carrying the mail. The plaintiff lived with my father's family, and worked on the farm with the other children and members of the family up to the spring of 1842, then went to Texas, served in the Texan army, and volunteered in the Mier expedition,- and returned in March, 1844. Henry was always known in the family and neighborhood as the negro of the plaintiff.

Cross-examined.—Col. D. exercised control over Henry in the same way he did over the other negroes on the farm, directed and ordered him about, always controlled all the negroes on the farm and directed what should be done; and plaintiff never set up in business for himself after he came of age, nor had a separate residence. Plaintiff was not present when the negroes on my father's place were levied on under attachments and executions. Col. D. stated at the time, as I think, that Henry belonged to the plaintiff, and told the officers to take all he had.

Re-examined.—When Henry was given to plaintiff, Col. D. had a plenty of property; was not much in debt, and had more property than would pay his debts. It was understood in the family before the plaintiff returned that he was dead—his uncle in Texas so wrote to the family.

James M. Danley.—He testified to the same facts as his brother

B. F. D., except that he was not present when Henry was given to plaintiff, nor when the negroes of Col. D. were levied on, and did not know what transpired on these occasions. He further stated that when Col. D. took the said mail contract he said he intended to give the plaintiff and myself a negro boy each, for carrying the mail on said route, and gave me a negro boy named Willis, in 1837, and had previously given the plaintiff the boy sued for. Was present when the negroes of Col. D. were sold under execution in the spring of 1844. Henry and Willis had been levied on as the property of Col. D., and were there to be sold among the other negroes, but I forbid the sale of Willis, and he was not sold, although Rector, the defendant, urged the sheriff to offer him and said he would give $500 for the interest of Col. D. in him. In March, 1846, before the suit was brought, the plaintiff demanded Henry from Rector, but the latter would not surrender him. Henry is worth $500, and his hire worth $10 per month.

Cross-examined.—All my fathers negroes were sold on that occasion, being 9 or 10 in number. Up to and on the day of sale the plaintiff and myself endeavored to procure security to have the executions superseded, and was in the office of the clerk of the Supreme Court, when Judge Clendenin or Gov. Adams said the sheriff was about to begin selling, and I immediately went there to attend it. I do not know whether the plaintiff was present at the time Henry was sold, but he was present and I saw him during the sale of the negroes, and the sale of Henry was not forbidden by any one, nor any claim set up to him by the plaintiff.

John Giles.—Henry is about 17 years old, and in 1839 Col. D. told me that the boy was purchased for and belonged to the plaintiff, and I have heard him repeat afterwards, on many occasions, that he had bought Henry for, and given him to the plaintiff because the plaintiff had conducted himself faithfully in carrying the mail, and he also said he had given a negro to James M. Danley for similar services. Henry was brought to and remained on the farm of Col. D., where plaintiff resided until he

went to Texas, and was generally called and known in the family and among the neighbors as the property of the plaintiff.

Cross-examined.—Was the brother-in-law of Col. D., and lived near for several years. Col. D. from the time Henry was brought home up to the death of Col. D. in 1844, worked said negro on his farm, with his other negroes and exercised acts of ownership and control over him. The plaintiff and the other children of Col. D. all worked on the farm and were all managed and controlled by him, as were the negroes and hired hands.

Joseph Moore.—In 1836, Col. D. had plenty of property—was not involved in debt. I was his neighbor and intimate with him and knew the boy Henry in controversy, over whom Col. D. exercised ownership and control in the same manner as he did over his other negroes on his farm; and when here the plaintiff lived in his fathers' family and worked on the farm. I think I have heard Col. D. say the boy belonged to plaintiff.

Alanson Hooper.—In 1834 Col. D. took a mail contract, and James M. Danley and the plaintiff carried the mail. In 1836, Col. D. said if they were faithful he intended to give them a negro boy, and afterwards he told me he had given the negro boy Henry purchased from Capt. Collins to James M. Danley, and I understood from the family of Col. D. that Henry belonged to James M. Danley.

Cross-examined. Was intimate with Col. D. and family—lived near neighbor five or six years, knew his negroes well, and I never heard in or from the family that Henry had been given to or belonged to the plaintiff Christopher C. Danley, and never heard the plaintiff claim him, and "always understood he had been given to James M. Danley, and he was frequently called master James' boy." Col. D. had no other negro by the name, and he had him on his farm, always controlled and had possession of Henry, and used him as his own property as long as he lived. The plaintiff lived in the family when here, and was about 18 years old in 1836.

Mrs. Alanson Hooper. Knew the boy Henry well—heard Col. D. say frequently that he intended to give the plaintiff a negro

boy for his services in carrying the mail, and when he bought Henry as he said at a reduced price, he stated that Henry was bought for the plaintiff, and that he could well afford to give the boy to plaintiff as he, Col. D. owed plaintiff for services more than the value of the boy. Plaintiff went after the negro, took him to his fathers' where the negro and the plaintiff remained up to the death of Col. D., except the time the plaintiff was in Texas. Plaintiff and other sons of Col. D. lived on the farm, and he controlled his children and negroes thereon and always had a general management of his farm and every thing on it.

Cross examined. Always understood from the family of Col. D. that Henry was bought for and given to the plaintiff by his father, and I told the plaintiff after the sale that I was astonished that he stood by and permitted Henry to be sold without setting up his claim or forbidding the sale.

The plaintiff closed his case.

The defendant introduced the following evidence:

Nelson B. Thomasson.—On the 27th May, 1841, I was deputy sheriff of Pulaski county and had acted in that capacity from the 16th November, 1842—knew the boy Henry in controversy, who was sold to Henry M. Rector the defendant at sheriff's sale, on the 27th May, 1844, as the property of Col. James Danley for 508 dollars and Rector paid the money and Henry was delivered to him. The sale of Henry and other negroes seized as the property of Col. D., was had under a *ven Ex.* No. 169 in favor of Robins' heirs against James Danley, Johnston and Field. I was present at the sale in the capacity of deputy sheriff, and sold some of the negroes, but think I did not sell Henry.—Lawson the sheriff sold some and I acted as clerk.—Henry was the third one sold, and he was put up on a table so that all could see him, was named and cried in a loud and distinct voice, as were each of the others—good many persons present—my impression is that Christopher C. Danley, the plaintiff, was present during the sale of the negroes. James M. Danley claimed one of the negroes named Willis, and he was not sold in consequence thereof. No other person claimed any of the other negroes. The plaintiff

not nor did any one for him set up any claim to said negro Henry, at the sale. In the fall of 1843, I seized the negroes of Col. D., on attachments against him—he threw open his doors, and told me to take all his property. I told him I wanted his negroes and he said take them, they were his and he had worked hard for them. This boy Henry was among the number—Col. D. did not say that Henry belonged to the plaintiff and no one except Col. D. set up any claim to him. Henry at time of sale worth 500 dollars—the return on the execution made out by me and in my hand writing.

This witness, on *Cross-examination*, stated that he could not say positively that the plaintiff was present, at the sale, but that such was his impression, and he gave reasons for it not necessary to be detailed.

The defendant read in evidence a judgment rendered March 8, 1841, in the Pulaski Circuit Court, on motion, without notice, in favor of Alfred Edwards and others, heirs of Wm. Robbins, deceased, and against James Danley principal, and John W. Johnston and William Field, securities, on delivery bond, and which judgment contained the following recital:

"On this day came the plaintiffs, by attorney, and it appearing "to the satisfaction of the court that execution issued on the "judgment rendered in this case at the last term of this court, and "that a delivery bond was given thereon by said defendants James "Danley, and John W. Johnston and William Field, as securities, "and said delivery bond was forfeited, and that the said judg- "ment still remains unsatisfied. It is therefore on motion of said "plaintiffs, considered by the court," &c., and it then proceeds to specify amounts, costs, &c., and this judgment and costs at the time of sale amounted to about 3,268 dollars.

The defendant read in evidence the executions which issued on the judgment, and among them the ven. ex. No. 169, issued thereon the 16th March, 1844, reciting a previous levy on Henry, and other negroes of James Danley, and which remained unsold, and under which ven. ex. the boy Henry and other negroes were sold after the death of James Danley, on the 27th May, 1844, and

read the return, and endorsements thereon, whereby it appeared that Henry M. Rector was the "highest and best bidder, and became the purchaser of the boy Henry for 508 dollars" and which return was signed by "James Lawson, jr., sheriff, by N. B. Thomasson deputy sheriff." The defendant also read in evidence two attachment writs levied on the negroes, Henry included, in the fall of 1843, as the property of James Danley, and the bonds given by him to release said negroes; also a mortgage made, acknowledged and recorded in Pulaski county, in September, 1843, from James Danley to his son James M. Danley, and in which the said negro boy Henry was included among the other slaves of the mortgagor; all which evidence was introduced against the objections of the plaintiff, but his objections were overruled, and he excepted; but these documents and papers are voluminous and not necessary to be detailed to understand the case.

James Lawson, jr., sheriff, also proved the levy upon said negro boy Henry, and a sale under said ven. ex. to Rector, defendant, for 508 dollars, the payment of the bid, the delivery to the purchaser, and that the amount paid was a high price. He also stated in addition that the negroes were offered at said sale separately, were placed on an elevated position on a table, so as to be seen by all, that the name, age, and description of each one, was loudly proclaimed and every one present might have heard. Witness could not say positively that plaintiff was present when Henry was sold, but thinks he was. Witness was acquainted with Col. D. several years—knew his negroes and the boy Henry was among them and worked on the farm, and was controlled by Col. D. the same as his other negroes. Never heard that any other person than Col. D. had any claim to him until the commencement of this suit—always supposed the boy belonged to Col. D. as he was continuously in his possession and held and used as his property. The sale of Henry was not forbidden by the plaintiff or any one for him, nor was any notice or intimation given of any title in the plaintiff, and the boy was levied on, cried and sold as the property of Col. D. James M. Danley

claimed a boy named Willis, who was not sold in consequence of it.

Cross-examined.—Before and on the morning of the sale the plaintiff and James M. Danley came to the sheriff's office and obtained copies of the process, and said ven. ex. No. 169, in my hands against Col. D., to apply for a supersedeas, but they did not get it.

C. P. Bertrand, Esq.—Had a general knowledge of the property of Col. D., and knew his negroes—knew Henry above alluded to, and who was always used and controlled by Col. D., as his own property, and Col. D. was always considered as the owner —never heard that the plaintiff had any claim or title to Henry, and never heard the plaintiff set up any until the commencement of this suit, and never heard Col. D. say the boy belonged to the plaintiff. I do not recollect whether I was present at the sale, but I was present a year or two before when Henry and other negroes of Col. D. were offered for sale under an appraisement at the Pulaski court house, as his property, but not bringing two-thirds of the value, were not sold. Col. D. and the plaintiff, and one or two of his other sons, were present on that occasion, and the plaintiff asserted no claim to Henry when offered as the property of his father.

Geo. C. Watkins, Esq.—Was one of the attorneys for Robbins' heirs, and had the ven. ex. issued. Col. D. died the 16th March, 1844. I was present at the sale of the Danley negroes on 27th of May, 1844, and the plaintiff was also present, and he, Gov. Adams and James M. Danley, frequently consulted together about bidding on the negroes, and two, Simon and John, were bid off by Adams, but it was understood at the time that they were bought for James M. Danley. Before the sale the plaintiff and his brother consulted a lawyer, E. L. Johnson, about superseding the execution, but abandoned the idea, because the negroes if released, would be subject to debts by execution, wherein Col. D. was security merely, and it was deemed best that the negroes should be sold under the ven. ex. as it would be paying a debt for which Col. D. was liable as principal, and on

which he had had long indulgence. The plaintiff never set up any claim to Henry to my knowledge, nor was his sale forbidden by any one. In the prosecution of the Robbins' heirs suit to satisfaction, and after levies on said negroes, Col. D. always spoke of the negroes as his own, and never intimated that any of them belonged to the plaintiff, or that the plaintiff had a claim to any of them. Henry sold at an extravagant price—he was worth about 450 dollars.

F. W. Trapnall, Esq.—Was one of the attorneys of Robbins' heirs, and was present at said sale. The plaintiff and James M. Danley were present during the sale, and I frequently conversed with them about the negroes. James M. Danley claimed a negro boy named Willis, and he was not sold; but there was no claim set up by any one to Henry, who was offered, cried, and sold as the property of Col. D. The plaintiff did not by himself or any other person assert any right or claim to Henry. There was a great deal of conversation between the plaintiff, James M. Danley, Gov. Adams and myself, about the sale and about bidding, and either the plaintiff or James M. Danley bid on some of the negroes sold under the ven. ex., but I cannot say that plaintiff bid on the negro boy Henry; but he asserted no claim to him, nor was his sale forbidden.

The defendant closed his case.

The plaintiff by way of rebutting evidence called *James M. Danley,* who testified that the plaintiff was in Texas about two years, and got home about March, 1844, that soon after he left home, letters were received from his uncle in Texas, that he had joined the Meir expedition against Mexico, and that he was supposed to have been killed, and from that time until his return, the family supposed the plaintiff to be dead, and all acted on that supposition.

The evidence in the bill of exceptions extends through sixty four pages, and the above is only an abstract of it, but sufficient to afford a correct understanding of the case.

The plaintiff moved instructions, and the court without giving or refusing them, proceeded to charge the jury generally and at

length, and among other things, to the effect that if the plaintiff was cognizant of the levy of executions against James Danley, upon the negro in controversy before the sale, and was also present at the sale, and stood by and permitted the defendant to purchase without asserting his right and making known his claim, but concealing it, he would be estopped from setting up any claim to the negro after such silence, and could not recover in this action.

The plaintiff moved the court to modify the instruction, and charge to the effect that the concealment of title and silence, must have been proven to be fraudulent in order to defeat the plaintiff's title, but the court refused to give it and the plaintiff excepted.

And the jury returned a verdict for the defendant, and the plaintiff moved for a new trial on the following grounds: (1) the court permitted the defendant to present illegal and incompetent evidence to the jury, (2) the court erred in instructing the jury; (3) the jury found contrary to evidence and without evidence; (4) the court refused to instruct the jury as requested by the plaintiff; and (5) the verdict was against law and evidence. The motion for a new trial was denied, and a bill of exceptions was taken, setting out the evidence on the trial, and the instructions and charge to jury in full.

The plaintiff brought error.

CUMMINS, for the plaintiff. The judgment under which the defendant purchased was upon a forfeited delivery bond without notice actual or constructive to the defendant therein, and it was therefore void. *McKnight vs. Smith,* 5 *Ark. Rep.* 409. *McKisick vs. Brodie,* 1 *Eng.* 375. 2 *Eng.* 94. 3 *Ark.* 490. *ib.* 558. *ib.* 262, which are sustained by *Thatcher et al. vs. Powell et al.,* 6 *Wheat.* 119. *Denning vs. Corwin & Roberts,* 11 *Wend.* 647. *Smith vs. Fowle,* 12 *Wend.* 9. *Borden vs. Witch,* 15 *J. R.* 121. *Mills vs. Martin,* 19 *J. R.* 7. *Shiners vs. Wilson,* 5 *Har. & John.* 130. 9 *Cowen* 227. 8 *ib.* 304. 3 *N. Hamp.* 265. 7 *Mass.* 79. 6 *Bin.* 483. 2 *How. U. S. Rep.* 43. A sale of property under such judgment

gives no title, and the proceedings may be impeached collaterally. *Doe ex dem. vs. Tupper,* 4 *Smedes & Marsh.* 261. 4 *id.* 538. *Id.* 549. 6 *Yerg.* 518. *Ib.* 471. There must be a valid judgment, execution, and sale, to confer title, under a sheriff's sale, either to real or personal property. 12 *Wend.* 74. 1 *Ld. Raym.* 73. 6 *J. R.* 196. 5 *Burr.* 26. 2 *Stark. N. P. Cas.* 175. 16 *Wend.* 562. 12 *J. R.* 213. 1 *Cow.* 622. 1 *Pet. C. C. R.* 64. 1 *Blackf.* 210.

A sale or gift by parol conveys title if accompanied by delivery; and where the sale or gift is perfected the possession of the father where the infant son lives with him is the possession of the son. *Dodd vs. McCraw,* 3 *Eng.* 84.

The rule *caveat emptor* applies to purchases at sheriff's sales. 2 *Kent's Com.* 78. 9 *Wheat.* 616. 1 *Blackf.* 10. 2 *Bay's Rep.* 169; and if the judgment debtor has no title, none can be sold and conveyed by the sheriff. 1 *Bay's Rep.* 317.

The presence of the owner and acquiescence in the sale by a sheriff where the judgment is void, can give no title. *Bell vs. Tombigbee R. R. Co.,* 4 *Smedes & Marsh.* 549. Acquiescence, or a request or encouragement by the owner to purchase is an equitable estoppel, (1 *J. C. R.* 344. 19 *Ves.* 159 *no.* 1. 2 *ib.* 44 *no.* 1,) and rest upon the principle of fraud, (7 *Ves.* 231;) but it is doubtful whether these rules attach at law, (*Stoors vs. Barker,* 6 *J. C. R.* 166;) and they cannot apply where the judgment is void. *Henderson et al. vs. Overton,* 2 *Yerg.* 394.

S. H. HEMPSTEAD, contra. To constitute a valid gift, *inter vivas,* formal delivery of possession is necessary. (2 *Kent* 438. *Grangiac vs. Arden,* 10 *J. R.* 293. 2 *Bibb.* 33. *Ib.* 102,) and the gift must be irrevocable by the donor. (5 *Litt.* 13. 2 *Stra.* 955. *Jefferson's Rep.* 79.) The gift in this case did not take effect because there was not actual delivery nor immediate possession. 2 *Black. Com.* 441. *Noble vs. Swith,* 2 *J. R.* 55. 7 *J. R.* 26. 12 *J. R.* 188. 18 *ib.* 14. 2 *Yerg.* 582.

A father is obliged to educate and support his children, and is entitled to their services and labor or its value during their mi-

nority, (1 *Black. Com.* 453. 2 *Kent* 192-3. *Reeve's Dom. Rel.* 290. 7 *Mon.* 145. 4 *Mason* 380;) such services cannot constitute a valuable consideration for a sale.

If a person who has a claim to, or is the owner of personal property, stands by and permits it to be sold without giving notice or asserting his right, he is estopped from setting up that right against an innocent purchaser in any tribunal. *Stephens vs. Bard,* 9 *Cow.* 247. *Bank U. S. vs. Lee,* 13 *Pet.* 118. 9 *Wend.* 147. 6 *Wend.* 436. 3 *Hill* 218. 8 *Wend.* 483. 3 *Pick.* 38. 4 *Wend.* 639. 2 *Campb.* 344. 10 *Adolphus & Ellis* 90. 3 *A. K. Marsh.* 452. 7 *Ves.* 235. 1 *Story's Eq.* 376, *sec.* 38. 1 *J. C. R.* 354. 2 *Atk.* 82. 2 *Vern.* 150. And in such case the rule of *caveat emptor* does not apply.

If the judgment and execution were void, and the sheriff had no right to sell, still the presence of the claimant and his acquiescence in the sale estop him from asserting his claim, for this doctrine of estoppel does not rest upon the validity or invalidity of the sale at all.

The judgment under which the defendant purchased was upon a delivery bond; the judgment states that the delivery bond was taken and forfeited, and that the judgment remained unsatisfied: this court will presume that the facts, so stated in the judgment, were proven. (2 *Tenn.* 217. 3 *Yerg.* 361. 8 *ib.* 434.) The recital is the same in effect as if it stated that the execution remained unsatisfied. (3 *Bibb.* 473.) For if a judgment is paid, the execution which is a mere process to enforce it, is necessarily satisfied, and so, on the other hand, if the execution is paid, the judgment on which it issued is extinguished, and consequently the distinction is merely verbal, and on which the title of an innocent purchaser should not be overthrown.

Mr. Justice WALKER delivered the opinion of the Court.

This is an action of trover, in which the plaintiff, to recover, must prove property in himself, and a right of possession at the time of the conversion by the defendant; (2) a conversion by the defendant; (3) the value of the property. The whole contest

relates to the title to the property: the proof on the other point is not questioned.

There can be no doubt from the evidence but that the plaintiff, whilst a minor, was engaged by his father in carrying the mail, in consideration of which he gave to the plaintiff the boy in dispute. It is contended by the defendant that this was a gift, and in order to make it a valid gift possession must at the time accompany it. It is true that, in the manner of conferring title, this transaction seems to have been treated as a gift, but the evidence, taken altogether, makes it rather a payment or satisfaction for services rendered by the son for the father (who it is admitted had a right to command his son's services) but who voluntarily promised him, in advance of the services, a negro boy for their performance. This agreement seems to have been consummated by the performance of the services on the part of the son, and the purchase of the slave in dispute for his son, and passing him over by express declaration that the boy was his son's and given in consideration of such services. If we treat this as a sale, the right to possession passed with the sale, and title was perfect without formal delivery If, however, it be considered a gift, possession must accompany the gift in order to make it valid. The evidence brings this case fully within the decision of this court in the case of *Dodd vs. McCraw,* 3 *Eng.* 84, where it was decided that where an infant child resides with his father at the time the gift is made, and continues a member of his family, the possession will be presumed to be in the infant, the rightful owner, although the father exercise control over the slave and appropriate his labor. This question was fully discussed in that case, and will be regarded as decisive of this point.

Title once acquired either by sale or gift is not divested by the mere fact that the purchaser or donee did not thereafter take the property into his exclusive possession, and appropriate it to his exclusive use. It is true that suffering the property to remain in the possession and control of the vendor, after sale, may in some instances, as regards subsequent creditors of the vendor, who contract with the vendor on the faith of the property thus aban-

doned to his use and apparent ownership, upon a question of fraud, be admissible. And so if the vendor or donor, at the time of the gift or sale, be in failing circumstances, prior creditors might well urge such circumstances in connection with others as evidence of fraud. But as the evidence in this case discloses neither subsequent creditors nor prior insolvency, the evidence adduced in regard to subsequent possession and acts of ownership must be restricted to the point as to whether in fact a sale or gift did take place, and if a gift, whether possession accompanied it at the time; for if it did, as before stated, subsequent possession and use by the donor could not defeat a title once acquired.

As regards the admissibility of the judgment and execution thereon as evidence, it will be found, upon examination of that record, that the judgment was rendered upon a delivery bond upon motion and without notice to the obligors, and comes directly within the decision of this court in the case of *McKnight vs. Smith,* 5 *Ark. R.* 409, which has been re-affirmed by several subsequent decisions of this court, wherein it is decided that in such cases as this the judgment of the Circuit Court is void; consequently the purchaser at execution sale under it acquired no title to the property and the evidence should have been excluded.

It is contended, however, that although this is a void sale, the plaintiff, a third person, who was present when the property was sold, silently acquiesced in the purchase of the property by the defendant, whereby he perpetrated a fraud upon the defendant. This doctrine will be found to rest for its support upon the principle of equitable estoppel, and the authorities referred to by the defendant's counsel go far to sustain it; as where A purchases of B, in the presence of C, who, with a full knowledge of the facts, stands by and fails to make his title known, he is equitably estopped from setting up his own title against such innocent purchaser. It is very questionable, however, whether this rule applies to common law proceedings. In the case of *Stoors* and *Booker vs. Barker,* 6 *John. Ch. R.* 166, the doctrine is discussed at considerable length, referring to and reviewing a leading case

in 1 *J. C. R.* 344. In the case in 6 *Johnson* the bill was for an injunction to stay an action at law in ejectment brought by Barker against Booker, to secure the possession of a tract of land held by Booker under a deed from Stoors. It appears that one Foster conveyed by deed to Stoors; that, pending the negotiation and before the deed was made, Barker told Foster that his (Foster's) title was good; he was also interrogated on behalf of Stoors before the purchase, whether he had or not a claim to the land, and answered that he had not, and advised Foster to sell and Stoors to buy. Three years after this sale and after valuable improvements had been made on the land with the knowledge and silent acquiescence of Barker, he asserted title to this land himself, and sued in ejectment to recover it. Under these circumstances, if a case could be conceived where the doctrine could be made to apply so as to amount to affirmance of title in the purchaser, or to estop him from setting up his legal title, it should have been done here; and yet in this case the chancellor, when referring to the case in 6 *Term R.*, where Lord MANSFIELD is reported by LAWRENCE, J., to have said: "That he would not suffer a man to recover in ejectment who stood by and saw the defendant build on his land," said, however he might question the existence of such a rule in a court of law, yet in chancery it is a well established rule. And accordingly decreed that the plaintiff be enjoined from asserting his title at law. It seems clear to us, from the facts of this case and the decision of the court upon it, that, if the effect of this acquiescence in the purchase of an innocent purchaser without notice, could have operated as an estoppel at law, or have amounted to an affirmance of title, the Chancellor, instead of discrediting this anonymous opinion of Lord Mansfield, would at once have so pronounced the law to be. But the very fact that the Chancellor decreed against the exercise of this legal right, shows that without such equitable interposition he believed that the legal rights of the party (however fraudulent it might be) remained unimpared, and that in order to avail himself of this equitable defence he must resort to the proper tribunal in such cases for redress.

But that this case may be presented under its own peculiar circumstances, we will proceed to examine it as connected with other legal principles, which apply to this class of sales, but which are inapplicable to sales generally. It will be remembered that this was a sheriff's sale in regard to which the principle of *caveat emptor* applies. *Henderson vs. Overton,* 2 *Yerg.* 394. *Thayer & Stringer vs. The Sheriff of Charleston,* 2 *Bay Rep.* 169. *Hurley vs. Baker,* 10 *Mo. Rep.* 157. And the same rule applies to sales by executors, administrators and other trustees. 2 *Har. & Gill* 176, *Ch. on Con.* 447. The case in 2 Yerger is not only an authority showing that the principle of *caveat emptor* applies, but there, as in this case, the judgment was declared void, and the claimant was not only present but bid for the property, and the court expressly held that the doctrine of equitable estoppel did not apply. We are therefore of opinion that the mere presence of a third person at a sheriff's sale, who has title to the property sold upon a void judgment, does not estop him from asserting his title at law to the property thus sold.

It remains to be seen whether the plaintiff in this case was in fact present at the time the slave in suit was set up and sold; for until he has proven positively to have been present at the time of the sale, no presumption of fraud arises which could affect him even in a court of equity. It is a rule of evidence which lies at the foundation of all presumptive evidence or deduction from facts that the facts themselves from which these presumptions arise must be clearly and satisfactorily proven. For if such were not the case it would be but raising presumption upon presumption, whereas the very existence of presumptions depends upon their usual and necessary connection with known facts. It is by the application of this rule that a third person who is present when property to which he has claim is offered for sale, and who stands by in silence and suffers an innocent purchaser to pay his money for it, is chargeable with fraud. When it is clearly proven that he was present at the time of the sale, and so situated that he must have been advised of the fact that his property was about being sold, and he remains silent, a presumption of intention to

defraud the purchaser arises and attaches to his conduct. But then in order to raise this presumption, it must be first positively proven that he was present at the very time the sale of that particular property took place. When these rules are applied to the evidence in this case it will be found that there is no positive proof that the plaintiff was present when this particular slave was sold. Most of the witnesses have no positive recollection that he was there at any time, but are of the impression that he was. One witness only says he was there certainly. That witness says "I do not know whether plaintiff was present when the negro sued for was sold or not, but I saw him when the sheriff was selling some time during the progress of the sale of the negroes under execution against my father. They were some time selling the whole lot of negroes—some nine or ten in number." Therefore under no state of case can the plaintiff be affected by this principle, as the proof fails to establish the fact of his presence at the time of the sale of the boy in suit.

The judgment of the court below must therefore be reversed, and a new trial must be awarded.